No. 15642

United States Court of Appeals

for the Ninth Circuit

ALBERT DEL GUERCIO, Officer in Charge, Immigration and Naturalization Service, Los Angeles, Calif.,

Appellant,

vs.

BENNIE SEVITT,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—9-13-57

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney, Chief of Civil Division;

BRUCE A. BEVAN, JR.,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California.

For Appellee:

WIRIN, RISSMAN & OKRAND,
257 South Spring Street,
Los Angeles 12, California.

In the United States District Court, Southern District of California, Central Division

No. 19588

BENNIE SEVITT,

Plaintiff,

vs.

ALBERT DEL GUERCIO, Officer in Charge, Immigration and Naturalization Service, Los Angeles, California,

Defendant.

COMPLAINT

(For Injunction and Declaratory Judgment)

Plaintiff alleges:

I.

Plaintiff, Bennie Sevitt, is a resident of Los Angeles, California. He is a native and citizen of Ireland.

II.

Defendant, Albert Del Guercio, is the duly appointed and acting Officer in Charge of the Immigration and Naturalization Service, United States Department of Justice, for the Los Angeles area. Defendant is charged with the administration and enforcement of the immigration and naturalization laws of the United States within said area and within the Southern District of California.

III.

This action is filed to restrain and enjoin defendant and [2*] his agents from enforcing or other-

*Page numbering appearing at foot of page of original Certified Transcript of Record.

wise carrying into effect an Order and Warrant of Deportation heretofore made, entered and issued against plaintiff, upon the ground that said Order and Warrant was, at all times herein, and still is, void, illegal and contrary to the law and evidence.

IV.

This Court has jurisdiction by virtue of the Administrative Procedures Act (5 USC 1001-1011), particularly Section 10 thereof (5 USC 1009), by virtue of Section 242(e) of the Immigration and Nationality Act, 1952 (8 USC 1252(e)), and by virtue of the Declaratory Judgments Act (28 USC 2201, et seq.), to declare said Order and Warrant unlawful, illegal and void, to vacate said Order and Warrant and terminate the within deportation proceedings and to restrain and enjoin defendant and his agents from executing or otherwise acting upon an unlawful and illegal Order and Warrant of Deportation.

V.

On or about March 24, 1954, plaintiff was served with a Warrant of Arrest and charged with being subject to deportation as an alien who, after his legal admission into the United States as a visitor for pleasure, failed to comply with the conditions of such status.

VI.

Subsequent to said arrest, hearings were held. During the course of said hearings an additional charge was lodged to the effect that plaintiff was subject to deportation as an alien who failed to fur-

nish address information as required by Section 265 of the Immigration and Nationality Act. Said additional charge was lodged despite the fact that, plaintiff is informed and believes and therefore alleges, the Immigration and Naturalization Service had knowledge of the alleged failure to furnish address information before and at the time it served the aforesaid Warrant of Arrest upon plaintiff. [3]

On or about December 8, 1955, a Special Inquiry Officer of the Immigration and Naturalization Service determined that plaintiff was subject to deportation and entered an order that plaintiff be deported.

Appeal from said decision and order was taken to the Board of Immigration Appeals, which Board, on or about January 24, 1956, dismissed the appeal, as a consequence of which said Order of Deportation became final and remains in full force and effect.

VII.

During said proceedings plaintiff filed timely applications for suspension of deportation and/or voluntary departure. Said applications were denied by the Board of Immigration Appeals not because of the exercise of discretion by said Board but because the Board refused, failed and did not exercise its discretion. The Board of Immigration Appeals, plaintiff is informed and believes, and therefore alleges, is the body duly authorized, empowered and delegated by the Attorney General of the United States to exercise the power to suspend deportation

and to authorize voluntary departure under the Immigration and Nationality Act, 1952.

Accordingly plaintiff has exhausted his administrative remedies. Plaintiff has been permitted to remain out of custody, on bond.

VIII.

On or about February 9, 1956, plaintiff received by Certified Mail from the office of defendant a written notice that arrangements to effect the deportation of plaintiff pursuant to the aforesaid order of deportation were being made.

IX.

Said Order of Deportation, the Findings of Fact and Conclusions of Law upon which said Order is based, and the administrative proceedings and action by the Immigration and Naturalization Service which have been sought and seek to effect plaintiff's deportation [4] are unlawful, illegal and void for the following reasons:

(1) The Finding, Conclusion and Order that plaintiff is deportable as an alien who failed to furnish address information as required by Section 265 of the Immigration and Nationality Act are not based upon, and are contrary to, reliable, reasonable, substantial and probative evidence, and is therefore contrary to plaintiff's right to Due Process of Law and to the Administrative Procedures Act and the Immigration and Nationality Act of 1952.

(2) The refusal and failure of the Board of Immigration Appeals to exercise its discretion as to whether plaintiff should be allowed suspension of deportation and/or voluntary departure is contrary to the Immigration and Nationality Act and to plaintiff's right to Due Process of Law.

X.

Plaintiff has no plain, speedy or otherwise adequate remedy at law, and unless defendant is restrained and enjoined by this Court, plaintiff will be placed beyond the jurisdiction of this or any Court of the United States and thereby suffer irreparable harm.

Wherefore, plaintiff prays judgment as follows:

1. For an injunction restraining and enjoining the defendant, his agents, servants, employees, representatives, and all persons acting under his direction or control, or in concert with him, from deporting plaintiff, or causing or attempting to cause the deportation of plaintiff under or by virtue of the Order or Warrant of Deportation herein;

2. Pending the hearing and determination of this action, for a temporary injunction and restraining order restraining and enjoining the defendant, his agents, servants, employees, representatives, and all persons acting or serving under his direction or control, or in concert with him, from deporting plaintiff, or causing or attempting to cause the deportation of plaintiff under or by virtue [5] of the

Order or Warrant of Deportation herein; and for such other and further relief as may be appropriate to preserve the status and rights of the parties herein pending the conclusion of these proceedings;

3. Declaring said Order and Warrant of Deportation void, illegal and contrary to law, and of no force or effect, and vacating or setting aside said Order and Warrant;

4. Declaring the deportation proceedings against plaintiff to be void, illegal and contrary to law, and of no force or effect, and terminating, vacating, setting aside and dismissing said deportation proceedings;

5. Or, in the alternative to Paragraphs 3 and 4 of this prayer, declaring said Order and Warrant of Deportation void, illegal and contrary to law, and of no force or effect, unless and until the Attorney General of the United States or the Board of Immigration Appeals exercise their, his or its discretion as to whether to grant plaintiff suspension of deportation and/or voluntary departure;

6. For such other and further relief as to the Court may seem just and proper.

WIRIN, RISSMAN & OKRAND,

By /s/ FRED OKRAND,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed March 2, 1956. [6]

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant, Albert Del Guercio, Officer in Charge, Immigration and Naturalization Service, Los Angeles, California, by his attorneys, Laughlin E. Waters, United States Attorney for the Southern District of California; Max F. Deutz and Volney V. Brown, Jr., Assistants United States Attorney for the same District, and for answer to the Complaint on file herein admits, denies and alleges as follows:

I.

Admits the allegations contained in Paragraphs I, II, V, VII and VIII.

II.

Denies each and every allegation contained in Paragraphs III and IX. [8]

III.

Admits the allegations contained in Paragraph VI, except denies that said additional charge was lodged despite the fact that the Immigration and Naturalization Service had knowledge of the alleged failure to furnish address information before or at the time it served the Warrant of Arrest upon plaintiff.

Wherefore, defendant prays that the relief prayed for in the said Complaint be denied, that the decision of the Special Inquiry Officer be affirmed, that

this Court order that plaintiff be deported from the United States in the manner provided by law on the charge contained in the Warrant of Arrest heretofore issued by the Immigration and Naturalization Service, that defendant recover his costs and disbursements herein incurred, and for such other and further relief as may be equitable and proper.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

VOLNEY V. BROWN, JR.,
Assistant U. S. Attorney,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 19, 1956. [9]

[Title of District Court and Cause.]

PRETRIAL ORDER

At a conference held under Rule 16, F.R.C.P., by direction of William M. Byrne, Judge, the following admissions and agreements of fact were made by the parties and require no proof:

(1) Plaintiff, Bennie Sevitt, is a resident of Los Angeles, California. He is a native and citizen of Ireland. He is thirty-seven years old.

(2) Defendant, Albert Del Guercio, is the duly appointed and acting Officer in Charge of the Immigration and Naturalization Service, United States Department of Justice, for the Los Angeles area. Defendant is charged with the administration and enforcement of the immigration and naturalization laws of the United States within said area and within the Southern District of California.

(3) This Court has jurisdiction by virtue of the Administrative [11] Procedures Act (5 USC 1001-1011), particularly Section 10 thereof (5 USC 1009), by virtue of Section 242 (3) of the Immigration and Nationality Act, 1952 (8 USC 1252 (e)), and by virtue of the Declaratory Judgments Act (28 USC 2201, et seq.), to declare said Order and Warrant unlawful, illegal and void, to vacate said Order and Warrant and terminate the within deportation proceeding and to restrain and enjoin defendant and his agents from executing or otherwise acting upon an unlawful and illegal Order and Warrant of Deportation.

(4) On or about March 24, 1954, plaintiff was served with a Warrant of Arrest and charged with being subject to deportation as an alien who, after his legal admission into the United States as a visitor for pleasure, failed to comply with the conditions of such status.

(5) Subsequent to said arrest, hearings were held. During the course of said hearings an additional charge was lodged to the effect that plaintiff

was subject to deportation as an alien who failed to furnish address information as required by Section 265 of the Immigration and Nationality Act.

On or about December 8, 1955, a Special Inquiry Officer of the Immigration and Naturalization Service determined that plaintiff was subject to deportation on both grounds and entered an order that plaintiff be deported.

Appeal from said decision and order was taken to the Board of Immigration Appeals, which Board, on or about January 24, 1956, dismissed the appeal, as a consequence of which said Order of Deportation became final and remains in full force and effect.

(6) During said proceedings plaintiff filed timely applications for suspension of deportation and/or voluntary departure. Said applications were denied by the Board of Immigration Appeals not because of the exercise of discretion by said Board but because the Board refused, failed and did not exercise its discretion. The Board of Immigration Appeals is the body duly authorized, empowered and delegated by the Attorney General of the United States to exercise [12] the power to suspend deportation and to authorize voluntary departure under the Immigration and Nationality Act, 1952.

Accordingly plaintiff has exhausted his administrative remedies. Plaintiff has been permitted to remain out of custody, on bond.

(7) On or about February 9, 1956, plaintiff received by Certified Mail from the office of defendant a written notice that arrangements to effect the deportation of plaintiff pursuant to the aforesaid order of deportation were being made.

(8) Plaintiff's only entry into the United States was at Rouses Point, New York, on March 18, 1947, on a valid visa as a temporary visitor for pleasure for a period of two weeks. An extension of that visa has neither been applied for nor granted.

Issues of Law

1. Is the holding by the Board of Immigration Appeals that plaintiff failed to furnish address information as required by Section 265 of the Immigration and Nationality Act (8 USC 1305) based upon reasonable, substantial and probative evidence?

2. If the answer to Issue No. 1 is yes, is the holding of the Board of Immigration Appeals that such failure was not reasonably excusable or was not wilful, based upon reasonable, substantial and probative evidence?

3. Is the holding of the Board of Immigration Appeals that plaintiff is deportable under Section 241 (a) (5) of the Immigration and Nationality Act (8 USC 1251 (a) (5)), arbitrary or capricious?

Issues of Law

1. Is plaintiff entitled to have the question of his eligibility for suspension of deportation con-

sidered under Section 244 (a) (1) of the Immigration and Nationality Act (8 USC 1254 (a) (1))?

2. Is plaintiff eligible for voluntary departure under Section 244 (e) of the Immigration and Nationality Act (8 USC 1254 (e))?

The foregoing admissions of fact have been made by the parties [13] in open court at the pretrial conference; and issues of fact and law being thereupon stated and agreed to, the Court makes this Order which shall govern the course of the trial unless modified to prevent manifest injustice.

Dated Nov. 26, 1956.

/s/ WM. M. BYRNE,
Judge of U. S. District Court.

The foregoing pretrial Order is hereby approved:

/s/ FRED OKRAND,
Attorney for Plaintiff.

/s/ VOLNEY V. BROWN, JR.,
Attorney for Defendant.

[Endorsed]: Filed November 26, 1956. [14]

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

Bennie Sevitt is an alien, a native and citizen of Ireland who entered the United States on March 18, 1947, with a visitor's visa. He has resided in this country continuously since that time.

After a hearing conducted by a Special Inquiry Officer of the Immigration and Naturalization Service, Sevitt was found to be deportable under 8 U.S.C. 1251 (a) (5)[1] for failure to register and notify the Immigration and Naturalization Service of his address in the United States or to notify them of changes of address as required by 8 U.S.C. 1305. Timely application for suspension of deportation was filed and an appeal was taken to the Board of Immigration Appeals, which Board dismissed the appeal and refused to consider plaintiff's application for suspension of deportation because it thought it was barred from doing so. [15]

Sevitt has exhausted his administrative remedies and here seeks judicial review of the administrative action. 5 U.S.C. 1009; 8 U.S.C. 1252; Shaughnessy v. Pedreiro, 349 U.S. 48.

The plaintiff asserts that there is no reasonable, substantial or probative evidence to support the administrative finding that he failed to furnish address information as required by 8 U.S.C. 1305, or to support the finding that such failure was wilful

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[1]Plaintiff was also found deportable for violation of 8 U.S.C. 1251 (a)(9), in that as a temporary visitor for pleasure he failed to comply with the conditions of that status. However, in this proceeding we are only concerned with the administrative decision relating to 8 U.S.C. 1251(a)(5), as the ultimate issue here is whether the plaintiff's application for suspension of deportation may be considered, and the determination of that issue depends upon the construction to be given 8 U.S.C. 1251 (a)(5).

and not excusable. This argument is without merit. The administrative record shows (Brief filed with Board) Sevitt conceded "* * * that until the time of his arrest by Immigration Officers he did not furnish the required address information" and that "he failed to register because he feared detection * * *" The record also shows that during the period he failed to comply with the address requirements, he used a fictitious name. It is an understatement to say that the administrative findings were based upon reasonable, substantial and probative evidence.

A more serious problem is presented on the question of whether the Board of Immigration Appeals erred in refusing to consider Sevitt's application for suspension of deportation.

The authority to grant the relief of suspension of deportation is found in 8 U.S.C. 1254(a)[2] which is divided into five paragraphs numbered (1) to (5).

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[2] § 1254 Suspension of Deportation—Adjustment of status for permanent residence; contents:

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who:

(1) Applies to the Attorney General within five years after the effective date of this chapter for suspension of deportation; last entered the United States more than two years prior to June 27, 1952; is deportable under any law of the United States and is not a member of a class of aliens whose deportation could not have been suspended by reason of section 19(d) of the Immigration Act of 1917,

Each of the five [16] paragraphs relates to different classes of aliens, the classification depending upon when the alien entered the United States, the grounds of deportation, whether the deportable act

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as amended; and has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent or child, who is a citizen or an alien lawfully admitted for permanent residence; or

(2) Last entered the United States within two years prior to or at any time after June 27, 1952; is deportable under any law of the United States solely for an act committed or status existing prior to or at the time of such entry into the United States and is not within the provisions of paragraph (4) of this subsection; was possessed of all of the requisite documents at the time of such entry into the United States; has been physically present in the United States for a continuous period of not less than five years immediately preceding his application under this paragraph, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this chapter in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent or child, who is a citizen or an alien lawfully admitted for permanent residence; or

(3) Last entered the United States within two years prior to, or at any time after June 27, 1952;

was committed or status existed prior to entry, at the time of entry, or subsequent to entry, and the length of time the alien has been present in the United States.

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is deportable under any law of the United States for an act committed or status acquired subsequent to such entry into the United States and is not within the provisions of paragraphs (4) or (5) of this subsection; as possessed of all of the requisite documents at the time of such entry into the United States; has been physically present in the United States for a continuous period of not less than five years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this chapter in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence; or

(4) Last entered the United States within two years prior to, or at any time after June 27, 1952; is deportable under paragraph (1) of section 1251 (a) of this title insofar as it relates to criminals, prostitutes or other immoral persons, subversives, violators of narcotic laws and similar classes or under paragraph (2) of section 1251 (a) of this title, as a person who entered the United States without inspection or at a time or place other than as designated by the Attorney General, or without the proper documents and is not within the provisions of paragraph (5) of this subsection; has been physically present in the United States for a continuous period of not less than ten years after such entry and immediately preceding his application

The complexity of the problem in the instant case results from the fact that an alien such as Sevitt who has violated the registration requirements falls

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under this paragraph and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this chapter in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence; or

(5) Is deportable under paragraphs (4)-(7), (11), (12), (14-17), or (18) of section 1251(a) of this title for an act committed or status acquired subsequent to such entry into the United States or having last entered the United States within two years prior to, or at any time after June 27, 1952, is deportable under paragraph (2) of section 1251 (a) of this title as a person who has remained longer in the United States than the period for which he was admitted; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this chapter in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien admitted for permanent residence.

within the provisions of both paragraph (1) and paragraph (5), except that to be eligible for suspension of deportation under (5), the alien must have been physically present in the United States for a continuous period of not less than ten years immediately [17] following the commission of the act (failure to register) for which he is deportable; whereas to be eligible under (1), the alien need only be present in the United States for a period of not less than seven years immediately preceding the date of application for suspension of deportation. The crucial importance of this difference to Sevitt is that he has been in this country for the seven-year period required under (1) but has not been in the country for the ten-year period required under (5).

The Board of Immigration Appeals refused to consider Sevitt's application for suspension of deportation for the reason, as counsel for the Government now argues, that while the reference in paragraph (1) to aliens "deportable under any law of the United States" technically includes aliens deportable for failure to meet registration requirements, paragraph (1) does not apply to such aliens because paragraph (5) specifically refers to the section of law making that offense deportable. It is the government's position that when an alien is deportable under any provision of law specifically mentioned in paragraph (5), his application for suspension of deportation may be considered, if at all, only under that paragraph.

The five paragraphs of § 1254(a) show a statutory design to enact remedial legislation covering a number of different contingencies. In formulating the several possible categories, Congress provided that a deportable alien is eligible for the discretionary relief of suspension of deportation if he qualifies under the provisions of paragraphs (1) or (2) or (3) or (4) or (5). By the use of the disjunctive conjunction, "or," it is clear that Congress intended to present a choice dependent only upon the alien meeting the standards as required [19] in the particular paragraph he seeks to avail himself of. Sevitt satisfies the requirements of paragraph (1) as he applied for the relief within five years after the effective date of the 1952 Act; he entered the United States more than two years prior to the enactment of the Act; he is deportable under a law of the United States and is not a member of a class of aliens whose deportation could not have been suspended by reason of section 19(d) of the 1917 Act; he has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of his application. It follows that his application should have been considered by the Board of Immigration Appeals.

Under the provisions of § 1254(e) an alien who is deportable for failure to comply with the registration requirements may be granted the privilege of voluntary departure only if he can meet the ten-year requirement of § 1254(a)(5). It is unreasonable to believe, asserts the government, that notwith-

standing Sevitt's inability to meet the standards for the discretionary relief of voluntary departure, Congress intended that he be eligible for the greater relief of suspension of deportation under the standards set forth in paragraph (1) of § 1254(a). The answer to this assertion may be found [20] in the time limitation of paragraph (1) which paragraph by its terms becomes ineffective after June 27, 1957. However, be that as it may, the courts should not resort to conjecture regarding policy decisions of Congress.

While it is the rule that the courts may depart from the strict wording of a statute in order to give the statute a reasonable construction where a literal construction would result in an absurdity or defeat the object intended by Congress (Miller v. Bank of America, N. T. & S. A. (CA 9), 166 F. 2d 415), where the statute is clear and unambiguous it must be literally construed. Hamilton v. Rathbone, 175 U.S. 414; Thompson v. United States, 246 U.S. 547; Crooks v. Harrelson, 282 U.S. 55. Nothing could be clearer than the statement of Congress that the Attorney General may, in his discretion, suspend deportation in the case of an alien who meets the standards prescribed in paragraph (1) of § 1254 (a).

This Court in Acosta v. Landon, 125 F. Supp. 434, 441, said:

> "The courts may not suspend the deportation of a deportable alien as that discretionary

power is vested solely in the Attorney General, 8 U.S.C.A., § 1254. However, when the Attorney General is required as a condition precedent to an order of deportation to exercise his discretion with respect to the suspension of deportation, the validity of the order must rest upon the needed exercise of discretion. If it is lacking the order is ineffective. Where the order is ineffective, the custody of the petitioner is unlawful, and the court must order his discharge. A formal order to that effect will be entered."

Acosta v. Landon was a habeas corpus proceeding and Acosta was in custody. Sevitt is not in custody and there is no need to order his discharge. However, the order of deportation is ineffective and the alien may not be deported until the Attorney General, acting through his subordinates, has exercised his discretion. Judgment will be entered accordingly.

Counsel for plaintiff will prepare, serve and lodge findings and judgment pursuant to Rule 7 of the Rules of this Court.

Dated March 26, 1957.

/s/ WM. M. BYRNE,
United States District Judge.

[Endorsed]: Filed March 27, 1957. [21]

In the United States District Court, Southern District of California, Central Division

No. 19588—WB

BENNIE SEVITT,

Plaintiff,

vs.

ALBERT DEL GUERCIO, Officer in Charge, Immigration and Naturalization Service, Los Angeles, California,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The above-entitled cause came on regularly for trial on January 21, 1957, in the above-entitled court before the Honorable William M. Byrne, Judge, presiding without a jury; the plaintiff was represented by his attorneys, Wirin, Rissman & Okrand, by Fred Okrand; the defendant was represented by his attorneys, Laughlin E. Waters, United States Attorney; Max F. Deutz and Volney V. Brown, Jr., Assistants United States Attorney, by Volney V. Brown, Jr. Evidence having been introduced on behalf of the plaintiff and the defendant, and the court having considered same, and the court having heard the arguments of counsel and being fully advised in the premises, now makes the following: [22]

Findings of Fact

I.

Plaintiff, Bennie Sevitt, is a resident of Los Angeles, California. He is a native and citizen of Ireland. He is thirty-seven years old.

II.

Defendant, Albert Del Guercio, is the duly appointed and acting Officer in Charge of the Immigration and Naturalization Service, United States Department of Justice, for the Los Angeles area. Defendant is charged with the administration and enforcement of the immigration and naturalization laws of the United States within said area and within the Southern District of California.

III.

On or about March 24, 1954, plaintiff was served with a Warrant of Arrest and charged with being subject to deportation under 8 USC 1251(a)(9) as an alien who, after his legal admission into the United States as a visitor for pleasure, failed to comply with the conditions of such status.

IV.

Subsequent to said arrest, hearings were held. During the course of said hearings an additional charge was lodged to the effect that plaintiff was subject to deportation under 8 USC 1251(a)(5) as an alien who failed to furnish address information as required by Section 265 of the Immigration and Nationality Act (8 USC 1305).

On or about December 8, 1955, a Special Inquiry Officer of the Immigration and Naturalization Service determined that plaintiff was subject to deportation on both grounds and entered an order that plaintiff be deported.

Appeal from said decision and order was taken to the Board of Immigration Appeals, which Board, on or about January 24, 1956 [23] dismissed the appeal, as a consequence of which said Order of Deportation became final.

V.

During said proceedings plaintiff filed timely applications for suspension of deportation and/or voluntary departure. Said applications were denied by the Board of Immigration Appeals not because of the exercise of discretion by said Board but because the Board refused, failed and did not exercise its discretion, under 8 USC 1254(a)(1) because it thought it was barred from doing so. The Board of Immigration Appeals is the body duly authorized, empowered and delegated by the Attorney General of the United States to exercise the power to suspend deportation and to authorize voluntary departure under the Immigration and Nationality Act, 1952.

Accordingly plaintiff has exhausted his administrative remedies. Plaintiff has been permitted to remain out of custody, on bond.

VI.

On or about February 9, 1956, plaintiff received by Certified Mail from the office of defendant a

written notice that arrangements to effect the deportation of plaintiff pursuant to the aforesaid order of deportation were being made.

VII.

Plaintiff's only entry into the United States was at Rouses Point, New York, on March 18, 1947, on a valid visa as a temporary visitor for pleasure for a period of two weeks. An extension of that visa has neither been applied for nor granted. Plaintiff has resided in this country continuously since that time.

VIII.

The administrative record shows that until the time of his [24] arrest by Immigration Officers, Plaintiff did not furnish the required address information and he did not register as an alien because he feared detection.

From the foregoing Findings of Fact, the court makes the following:

Conclusions of Law

I.

This court has jurisdiction by virtue of the Administrative Procedures Act (5 USC 1001-1011), particularly Section 10 thereof (5 USC 1009), by virtue of Section 242 (3) of the Immigration and Nationality Act, 1952 (8 USC 1252 (e)), and by virtue of the Declaratory Judgments Act (28 USC 2201, et seq.), to declare said Order and Warrant unlawful, illegal and void, to vacate said Order and

Warrant and terminate the within deportation proceeding and to restrain and enjoin defendant and his agents from executing or otherwise acting upon an unlawful and illegal Order and Warrant of Deportation.

II.

The holding by the Board of Immigration Appeals that plaintiff is deportable under 8 USC 1251(a)(5) is based upon reasonable, substantial and probative evidence.

III.

The Board of Immigration Appeals erred in refusing to consider plaintiff's application for suspension of deportation under 8 USC 1254(a)(1).

IV.

The order of deportation is ineffective and plaintiff may not be deported unless and until the Attorney General, acting through his subordinates, exercises his discretion. [25]

V.

Let judgment be entered accordingly.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed:

1. The Order of Deportation of December 8, 1955, by the Special Inquiry Officer, as affirmed by

the Order of the Board of Immigration Appeals of January 24, 1956, that plaintiff, Bennie Sevitt, be deported is ineffective.

2. Plaintiff, Bennie Sevitt, may not be deported unless, or until, the Attorney General, acting through his subordinates, has exercised his discretion as to whether said Bennie Sevitt shall be granted suspension of deportation.

Dated: April 2, 1957.

/s/ WM. M. BYRNE,
Judge, U. S. District Court.

Approved as to form in accordance with Local Rule 7, this .... day of ....., 1957.

/s/ BRUCE A. BEVAN, JR.,
Assistant United States Attorney.

[Endorsed]: Filed April 2, 1957.

Docketed and entered April 3, 1957. [26]

[Title of District Court and Cause.]

NOTICE OF APPEAL
[Rule 73b F.R.C.P.]

Defendant hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment entered in this action by the above-entitled Court on April 2, 1957.

Dated: May 31, 1957.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ BRUCE A. BEVAN, JR.,
Assistant U. S. Attorney,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 31, 1957. [27]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages, numbered 1 to 33, inclusive, containing the original

Complaint;
Answer;
Pretrial Order;
Memorandum of Decision;
Findings of Fact, Conclusions of Law and Judgment;

Notice of Appeal;

Appellant's Designation of Record on Appeal;

Motion to Extend Time for Filing and Docketing Record on Appeal;

B. Defendant's Exhibit A.

I further certify that the fee for preparing the foregoing record, amounting to $1.60 has not been paid by appellant.

Witness my hand and seal of the said District Court this 24th day of July, 1957.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 15642. United States Court of Appeals for the Ninth Circuit. Albert Del Guercio, Officer in Charge, Immigration and Naturalization Service, Los Angeles, Calif., Appellant, vs. Bennie Sevitt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed July 25, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15642

ALBERT DEL GUERCIO, Officer in Charge, Immigration and Naturalization Service, Los Angeles, California,

Appellant,

vs.

BENNIE SEVITT,

Appellee.

APPELLANT'S STATEMENT OF POINTS

Pursuant to Rule 17(6) of this Court, appellant relies upon the following statement of points:

1. The trial court erred in adjudging that appellee may not be deported until his application for suspension of deportation has been considered under 8 U.S.C., § 1254(a)(1).

2. The trial court erred in concluding that the Board of Immigration Appeals erred in refusing to consider appellee's application for suspension of deportation under 8 U.S.C., § 1254(a)(1).

3. The trial court erred in deciding that appellee's application for suspension of deportation should have been considered under 8 U.S.C., § 1254(a)(1).

4. The trial court erred in deciding that appellee's application for suspension of deportation

should not have been considered under 8 U.S.C., § 1254(a)(5).

Dated: This 21st day of August, 1957.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ BRUCE A. BEVAN, JR.,
Assistant U. S. Attorney,
Attorneys for Appellant.

[Endorsed]: Filed August 23, 1957.

[Title of Court of Appeals and Cause.]

STIPULATION FOR CONSIDERATION OF EXHIBIT IN ITS ORIGINAL FORM

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel and subject to the approval of this Court, that defendant's Exhibit A (the certified copy of administrative proceedings) may be considered in its original form by this Court in connection with the pending appeal, and need not be printed.

Dated: This 21st day of August, 1957.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ BRUCE A. BEVAN, JR.,
Assistant U. S. Attorney,
Attorneys for Appellant.

WIRIN, RISSMAN & OKRAND,

By /s/ FRED OKRAND,
Attorneys for Appellee.

So Ordered:

/s/ STEPHENS,
Chief Judge, U. S. Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed August 29, 1957.